

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

76-1568

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

JOHN ERROL ASHER, :

Defendant-Appellant. :

-----X

Docket No. 1568

*B
P/s*

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

STANLEY S. ARKIN
S. ANDREW SCHAFFER
Of Counsel



STANLEY S. ARKIN p.c.
300 MADISON AVENUE
NEW YORK, NEW YORK 10017

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REPLY BRIEF FOR DEFENDANT-APPELLANT

ARGUMENT

THE SENTENCE ON COUNT 2 IS
ILLEGAL AND MUST BE VACATED

In its brief the government argues that consecutive sentences for two convictions, where one offense is a lesser included offense of the other, are only illegal where the cumulative sentences together exceed the maximum allowable penalty on the greater of the two offenses. In support of this proposition it cites two cases, Prince v. United States, 352 U.S. 19 (1957); and United States v. Cramer, 447 F. 2d 210 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972). Its argument is without merit.

First, as indicated in the defendant's original brief on appeal, this Court has extended the principle of Prince v. United States, supra, to prohibit concurrent sentences under separate sections of the federal bank robbery statute. Gorman v. United States, 456 F. 2d 1258 (2d Cir. 1972).

Second, United States v. Cramer, supra, represents an aberration in a clear line of authority in the Second Circuit and elsewhere and must be considered to have been wholly eroded. In United States v. Rosenthal, 454 F. 2d 1252, 1255 (2d Cir.), cert. denied, 406 U.S. 931, (1972) (decided after Cramer), the defendant was convicted of violating 26 U.S.C. §§7201 and 7203 for both tax evasion and wilfully failing to file a tax return for the year 1962. He received concurrent nine month sentences on each count. This Court, after holding that the crime defined in §7203 was a lesser included offense of that defined in §7201, vacated the conviction and set aside the sentence for the violation of §7203 even though each of the sentences was obviously less than the maximum five year penalty for tax evasion.

Whatever doubt there may have been as to the continuing vitality of Cramer after Rosenthal was fully resolved by this Court's opinion in United States v. Slutsky, 478 F. 2d 832 (2d Cir.) cert. denied, 416 U.S. 937 (1973). In Slutsky, the Court did not content itself with merely vacating the sentences which

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had been imposed on the lesser included offenses insofar as they caused the maximum penalties for the greater offenses to be exceeded. It wholly vacated the convictions (487 F. 2d at 845). In support of this result the Slutsky court cited United States v. Rosenthal, supra, and United states v. Newman, 468 F. 2d 791, 796 (5th Cir.) cert. denied, 411 U.S. 905 (1973). The holding in the Newman case with respect to the sentencing issue before this Court was directly contrary to the holding in Cramer. In Newman the defendant had been convicted of three counts of tax evasion under 26 U.S.C. §7201 for the years 1968-1970 and three counts of failing to file a tax return in violation of 26 U.S.C. §7203 for the same years. The defendant was sentenced to three concurrent 30 month sentences for the tax evasion counts, and three concurrent six month sentences for the failure to file counts, except that the six month sentences were made to run consecutively to the 30 month sentences (468 F. 2d at 793). Even though the aggregate prison sentences imposed were less than the maximum permissible sentence for tax evasion, the Fifth Circuit, relying on United States v. Rosenthal, supra, vacated the sentences and the convictions for the violations of §7203. The court, in the clearest of terms, articulated the principle which Asher advances on this

appeal:

"Where a defendant's conduct violates two separate statutes, it is improper to impose sentences under both statutes where one offense (here, §7203, the misdemeanor) is, in effect, a lesser included offense of the other (here §7201, the felony). See United States v. Rosenthal, 2 Cir. 1972, 454 F. 2d 1252, 1255."

(468 F. 2d at 796). See also United States v. Terrell, 390 F. Supp. 371, 378 (S.D.N.Y. 1975) (Weinfeld, J.).

In short, the mandate of this Court in United States v. Slutsky in vacating both the sentences and the convictions for the lesser included offenses and the Court's reliance on Rosenthal and Newman make it clear that Cramer was an aberrant ruling which in no way governs this appeal. Thus the sentence imposed on Asher on Count 2 must be vacated.

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STANLEY S. ARKIN, p.c.
Attorneys for Defendant-
Appellant, John Errol Asher
300 Madison Avenue
New York, New York 10017

OF COUNSEL
Stanley S. Arkin
S. Andrew Schaffer

